Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-1409

BRUCE JOHN BAKER and JOHN STEPHEN BRYAN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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No.

BRUCE JOHN BAKER and JOHN STEPHEN BRYAN,
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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioners Bruce John Baker and John Stephen Bryan pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered January 19, 1978, affirming their convictions under 21 U.S.C. §841(a)(1) and 21 U.S.C. §846, and that on hearing the judgment of conviction be reversed.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Appendix A) is reported at

567 F.2d 924 (9th Cir. 1978). The order of the Court of Appeals denying the petitioners' motion for a rehearing and rejecting the suggestion for a rehearing *en banc* is attached hereto as Appendix B.

The memorandum and order of Judge Peckham in the United States District Court for the Northern District of California denying the petitioners' motion to suppress evidence (Appendix C) is unreported

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JURISDICTION

The judgment of the Court of Appeals was entered on January 19, 1978. Petitioners' timely motion for rehearing and rehearing *en banc* was denied on March 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I

Whether, if the uncontroverted record shows that a search warrant was issued for a vehicle, an appellate court may mistakenly find that a search warrant existed for a locked footlocker, and thus avoid being controlled by the recent Supreme Court decision of *United States v. Chadwick,* 97 S.Ct. 2476 (1977)

II

Whether *United States v. Chadwick*, 97 S.Ct. 2476 (1977), allows a locked footlocker in police custody

to be searched pursuant to a warrant for the vehicle in which the footlocker was found, or requires that a warrant be obtained specifically for the footlocker.

III

Whether an officer-affiant who has during a warrantless search discovered a locked footlocker in the trunk of a vehicle and who knowingly omits the prior search of the vehicle and the existence of the footlocker from his affidavit to the magistrate can lawfully use the resulting vehicle search warrant to search a footlocker in police custody.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV, provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

STATEMENT OF THE CASE

On August 17, 1976, petitioners Bruce John Baker and John Stephen Bryan were arrested while seated in Mr. Bryan's Buick automobile in Foster City, California. Their arrest was preceded by the arrest

of three co-defendants and came during a joint investigation by local police and federal Drug Enforcement Administration agents.[1]

Following the petitioners' arrest, a warrantless search of the Buick was conducted by Detective Bergman of the Foster City Police Department and agents of the federal Drug Enforcement Administration. Detective Bergman removed the keys from the ignition of the Buick and opened the trunk of that vehicle. He discovered a large, locked footlocker inside the trunk. The Buick containing the footlocker was seized and driven to the Foster City Police Department. Detective Bergman then applied for a search warrant for the Buick and another vehicle at the scene of the arrest.[2] In his affidavit to the magistrate, Detective Bergman failed to mention that the Buick had already been searched or that a locked footlocker had been found in the Buick's trunk. A search warrant was issued for the Buick.[3] Thereafter, on August 18, 1976, the footlocker was opened by a Foster City police officer and found to contain a quantity of cocaine.

Petitioners Baker and Bryan were charged with violating 21 U.S.C. §841(a)(1) (possession of cocaine with intent to distribute) and 21 U.S.C. 846 (conspiracy to distribute cocaine). They filed motions under Rule 41, Federal Rules of Criminal Procedure,

[1]The events leading up to their arrest are not material to this petition but are set out in detail in Appendix A, pp. ii-iii.

[2]Appendix D, p. xxvii. (The search of the other vehicle, a Chevrolet, is not material to this petition.)

[3]Appendix D.

to suppress the evidence from the locked footlocker. The motions were denied.[4] The petitioners waived jury trial. The evidence found in the footlocker was introduced against them and each petitioner was found guilty as charged by the Court. Both Mr. Baker and Mr. Bryan were sentenced to five years' custody with special parole terms of three years.

On appeal petitioners Baker and Bryan each raised the contention that the officer-affiant's conduct in conducting a warrantless search of the Buick and discovering a locked footlocker in the trunk and then knowingly omitting these facts from his affidavit to the magistrate vitiated the search warrant.

Subsequent to the briefs being filed, but before oral argument, this Court decided *United States v. Chadwick*, 97 S.Ct. 2476 (June 21, 1977). Petitioners notified the Court and the government by letter that they intended to rely on the *Chadwick* decision at oral argument. At the oral argument petitioners' primary contentions were that *Chadwick* was controlling because there was no warrant obtained for the locked footlocker and that in any case the search warrant for the vehicle was invalid because the affiant knowingly omitted his prior search of the Buick and his discovery of the footlocker from his affidavit.

The Court of Appeals affirmed the judgment of conviction.[5] Since it is asserted in the order that a search warrant existed for the footlocker, and because

[4]Appendix C, p. xxii.

[5]Appendix A, p. viii.

there is no discussion of the officer-affiant's omissions, neither of the petitioners' contentions are directly ruled on by the Court. This point was raised in petitioners' motion for rehearing and suggestion for rehearing *en banc*. The motion and suggestion were denied without comment.[6]

REASONS FOR ALLOWANCE OF THE WRIT

I

THE DECISION BELOW MUST BE REVERSED BECAUSE IT IS DIRECTLY IN CONFLICT WITH THE DECISION OF THIS COURT IN UNITED STATES v. CHADWICK.

In *United States v. Chadwick*, 97 S.Ct. 2476, 2479 (1977), this Court granted certiorari ". . . to decide whether a search warrant is required before federal agents may open a locked footlocker which they have lawfully seized at the time of the arrest of its owners, when there is probable cause to believe the footlocker contains contraband." The Court ruled that a valid search warrant must be obtained under these circumstances. In the instant case the facts are peculiarly similar to *Chadwick*. The petitioners were arrested in an automobile. Federal and state agents searched the vehicle and discovered a locked footlocker in the trunk. The car and the footlocker were seized and transported to a nearby police station where they remained in police custody until a later search was conducted. The search revealed contraband in the footlocker which was the basis for federal drug charges of possession with intent to distribute and conspiracy.

[6]Appendix B, p. x.

However, the Court of Appeals held that this case was not controlled by *Chadwick* because, "[i]n the case now before the court, a search warrant was obtained for the footlocker and it was opened pursuant thereto."[7]

The undisputed record in this case shows that the only search warrant that was obtained was for the vehicle, not the footlocker.[8] Furthermore, the record also reveals that the officer who searched the vehicle and discovered the locked footlocker specifically omitted any mention of that prior search or of the existence of a locked footlocker from his affidavit in support of the search warrant.[9]

The Court's ruling is not supported by the record and in itself is sufficient grounds to invoke this Court's power of supervision.

Moreover, the effect of the Court's ruling was to nullify the holding of *United States v. Chadwick*. In *Chadwick* the Chief Justice very clearly distinguished the privacy interests in luggage from the privacy interests in automobiles.

> "The factors which diminish the privacy aspects of an automobile do not apply to respondent's footlocker. Luggage contents are not open to public view, except as a condition to a border

[7]Appendix A, p. vii.
[8]Appendix D, p. xxiii.
[9]Appendix D, pp. xxvii-xxxii.

entry or common carrier travel; nor is luggage subject to regular inspections and official scrutiny on a continuing basis. Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile. *United States v. Chadwick, supra* at p. 2484."

Based on this different degree of privacy interests between automobiles and luggage, it would seem apparent that a search warrant directed at a vehicle would not be valid to search a locked footlocker in the vehicle.[10] And no warrant may issue unless it is supported by an affidavit, ". . . particularly describing the place to be searched, and the person or things to be seized." *United States Constitution, Amendment IV*. The locked footlocker in the instant case is most particularly not described as a place or thing to be searched. Since this case does seem to be directly controlled by *United States v. Chadwick*, contrary to the ruling of the Court of Appeals, the petitioners would respectfully suggest that certiorari be granted and the decision summarily reversed. Or in the alternative, petitioners respectfully suggest that the case be remanded to the Ninth Circuit for further consideration in light of *United States v. Chadwick*.[11]

[10]See *State v. Parker*, 380 A.2d 290 (New Jersey, 1977) (proper search of car trunk not valid for luggage in trunk).

[11]i.e., *Schleis v. United States*, 97 S.Ct. 2968 (1977).

II

THE DECISION BELOW MUST BE REVERSED BECAUSE IT UPHOLDS A SEARCH WARRANT WHERE THE OFFICER-AFFIANT KNOWINGLY OMITTED THE FACT THAT HE HAD ALREADY SEARCHED THE VEHICLE AND THAT HE HAD FOUND A LOCKED FOOTLOCKER IN THE TRUNK OF THE VEHICLE.

The fact that the officer-affiant had conducted a search of the Buick and found a locked footlocker in the trunk[12] and then omitted this information from his affidavit is uncontested in the record.[13] To uphold a search warrant under these circumstances implies that knowing omissions by an officer-affiant are permissible. That implied holding is in conflict with recent decisions of other circuits.

All the appellate courts that have considered the question have ruled that intentional omissions or misrepresentations by an officer-affiant, whether or not material to probable cause, will vitiate a warrant.[14] However, the courts have divided on whether the

[12]Appendix A, p. iii.

[13]Appendix D, pp. xxvii-xxxii.

[14]*United States v. Belcalfine*, 508 F.2d 58, 63 (1st Cir., 1974); *United States v. Pond*, 523 F.2d 210, 213-214 (2nd Cir., 1975); *United States v. Armocida*, 515 F.2d 29, 41 (3rd Cir., 1975), (same standards for omissions as misrepresentations); *United States v. Lee*, 540 F.2d 1205, 1208-1209 (4th Cir., 1976); *United States v. Thomas*, 489 F.2d 664, 669 (5th Cir., 1973) cert. denied, 95 S.Ct. 79 (1975); *United States v. Luna*, 525 F.2d 4, 8 (6th Cir., 1975); *United States v. Carmichael*, 489 F.2d 983, 988 (7th Cir., 1973); *Berard v. United States*, 525 F.2d 319, 321 (8th Cir., 1975) cert. denied, 96 S.Ct. 1511 (1976); *United States v. Damitz*, 495 F.2d 50, 56 (9th Cir., 1974) (dictum); *United States v. Hole*, 564 F.2d 298, 302 (9th Cir., 1974) (implied). Issue under submission in California Supreme Court. *People v. Cook*, 64 Cal.App. 3d 354 (1976) (hearing granted week of January 24, 1977, Crim. 19804). See *Inaccurate Search Warrant Affidavits As a Ground for Suppressing Evidence*, Kipperman, 84 Harv.L.Rev. 825, 831.

affiant must have an intention to deceive the magistrate.[15] The courts have also split on the question of when an omission or misstatement material to establishing probable cause will invalidate the warrant. Some courts have held that the affiant must be reckless,[16] while others feel that simple negligence is sufficient.[17]

These issues have arisen repeatedly in recent years and are likely to continue to come before the courts.[18] The question goes to the very heart of the warrant requirement of the Fourth Amendment and puts into question the integrity of the judicial process and the balance of responsibility between the police and the magistrate. As Mr. Justice Powell has stated:

> . . . a government search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation. *United States v. United States District Court*, 92 S.Ct. 2125, 2136 (1972).

[15]Intent to deceive magistrate necessary, *United States v. Thomas, supra,* at p. 669; *United States v. Luna, supra,* at p. 8. Not necessary, *United States v. Belcalfine, supra,* at p. 63.

[16]*United States v. Carmichael, supra,* at p. 988; *United States v. Lee, supra,* at pp. 1208-1209; *United States v. Marihart,* 492 F.2d 897, 900 (8th Cir., 1974).

[17]*United States v. Astroff*, 556 F.2d 1369, 1374 (5th Cir., 1977). See Kipperman, *supra,* 832.

[18]This Court now has before it the question of under what circumstances a defendant may present evidence to show that an affidavit made in support of a search warrant is untruthful. *Franks v. Delaware,* 373 A.2d 578, cert. granted 10/11/77 46 L.W. 3238, ... S.Ct. ....., oral argument 2/27/78 46 L.W. 3555. However, that case is decided, there will be cases, such as the instant case, where the record establishes that the affidavit is untruthful or incomplete without the necessity of a hearing.

This Court should provide guidance on an important question of federal constitutional law upon which the lower courts are divided.[19] It is imperative that there be a definitive decision on whether officer-affiant omissions and misstatements are to have any part in the search warrant process.

CONCLUSION

This is an important case which should draw the attention of this Court. It involves both the application of the *United States v. Chadwick* decision and the resolution of an important and undecided Fourth Amendment issue upon which the lower courts are divided.

It is respectfully submitted that certiorari should be granted to the Court below.

Dated, San Francisco, California,
March 30, 1978.

Respectfully submitted,
ROMMEL BONDOC,
STEFFAN IMHOFF,
Attorneys for Petitioners.

(Appendices Follow)

[19]"It appears that since 1965 other circuit opinions have divided somewhat as to under what circumstances false representations in an affidavit should lead to suppression of evidence seized under a search warrant. (citations omitted)" *United States v. Luna, supra,* 6.

Appendices

Appendix A

United States Court of Appeals
for the Ninth Circuit

United States of America, Plaintiff-Appellee, vs. Bruce John Baker, Defendant-Appellant.	No. 77-1134
United States of America, Plaintiff-Appellee, vs. John Stephen Bryan, Defendant-Appellant.	No. 77-1509

[Filed Jan. 19, 1978]

Appeal from the United States District Court
for the Northern District of California

OPINION

Before: BARNES and TRASK, Circuit Judges, and BURNS,* District Judge

TRASK, Circuit Judge:

This is an appeal by Bruce John Baker and John Stephen Bryan from a judgment of conviction for possession of cocaine with intent to distribute, 21

*Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation.

U.S.C. § 841(a)(1) and conspiracy to distribute cocaine, 21 U.S.C. § 846.

By this consolidated appeal the appellants put in question the validity of their arrest and the search of the trunk compartment of Bryan's automobile, both without a warrant, and the legality of the search of a locked footlocker in the same car pursuant to a warrant. We consider those issues properly raised, but agree with the district court that they are without merit and therefore affirm.

Both appellants filed motions to suppress which were denied, whereupon they waived jury trial and were found guilty by the court. From the district court's written opinion of the motion to suppress evidence we find that on August 17, 1976, federal agent Henley and state agent Bergman met in an undercover capacity with co-conspirators Wardley and O'Donnell at the Winery Restaurant in Foster City, California. O'Donnell sold Henley 27 grams of cocaine from a blue canvas flight bag, and informed him that he could sell him an additional four pounds which were in the possession of a "Debbie" from Palo Alto, California. After further negotiations and a telephone call, it was agreed that Debbie, the resident of the house where the cocaine was located, and the source of supply, would transport the cocaine to Foster City, and that O'Donnell would deliver it to the officers one-half pound at a time, cash on delivery.

At 7:10 p.m., O'Donnell left the restaurant to meet Debbie. Federal agent Wilson observed O'Donnell and two persons, later identified as co-conspirators

"Debbie" Sears and appellant Baker, appear from behind the Winery, walk into the parking lot, and enter O'Donnell's 1969 Chevrolet. Baker soon left the Chevrolet, and returned to the area behind the restaurant. He reappeared a few minutes later, and placed a blue canvas flight bag in the trunk of the Chevrolet. At 7:45 p.m., a 1969 Buick, driven by appellant Bryan, appeared from the direction from which Baker had come with the flight bag, and parked next to the Chevrolet. Baker and Sears then entered the Buick.

O'Donnell next led agent Henley to the trunk of the Chevrolet, opened the flight bag, and showed him the one-half pound of cocaine. Henley arrested O'Donnell. Shortly thereafter, state and federal officers arrested Sears, Baker, Bryan, and Wardley. Agents removed the car keys from the ignition of the Buick, and opened its trunk.[1] The trunk contained a briefcase and a metal footlocker. Agent Bergman opened the briefcase, and found a large amount of money. Pursuant to a booking search at the police station, officers discovered that all the defendants except Wardley were in possession of pre-recorded money used earlier that day to purchase the cocaine from O'Donnell. The next day, after a search warrant was obtained, the agents opened the footlocker and found that it contained 1,307.8 grams of cocaine.

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[1]During the time between trial and the exhibits were forwarded to this court, Government Exhibit No. 1 was apparently lost. This exhibit showed the relative positions of the vehicles involved in the case. So that the record on appeal would be complete, appellants submitted a sketch that had been made from the original. Appellants' motion to include the sketch as a substitute for Exhibit No. 1 is granted.

Initially, we find there was probable cause to arrest both Bryan and Baker. In *Beck v. Ohio,* 379 U.S. 89, 91 (1964), the Court said:

> "Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense. *Brinegar v. United States,* 338 U.S. 160, 175-176; *Henry v. United States,* 361 U.S. 98, 102. 'The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating . . . often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.' *Brinegar v. United States, supra,* at 176."

Here, both Baker and Bryan were inextricably enmeshed with the other defendants in the sale and delivery of the contraband. In addition, the officers had information from Agent Henley and Officer Bergman of a consummated sale of 27.31 grams of cocaine from a blue canvas flight bag that figured prominently in all transactions as a carrier for the cocaine being bartered and sold. The two appellants were clearly not innocent observers, but participants in the venture. The arrest was upon probable cause.

Turning to the automobile, we are mindful that the cocaine was at a distance from the point of delivery

and had to be transported from Palo Alto, California to Foster City, California. The use of an automobile was necessary. When the Buick arrived, it was driven by Bryan and parked next to a Chevrolet which had the flight bag and one-half pound of cocaine in its trunk. Immediately after the arrest of Bryan and Baker, the agents immobilized the Buick by taking its keys. It was when the trunk of the Buick was opened that there was found a briefcase containing money and the locked metal footlocker. Clearly there was probable cause to believe the Buick was a part of the operation and might well contain other portions of the supply of cocaine.

Exigent circumstances to seize the vehicle also existed. It was then about 8:00 o'clock in the evening. To obtain a search warrant might require a considerable amount of time. *Chambers v. Maroney,* 399 U.S. 42, 48 (1970). Notice had been taken of a green van that had been circling the parking lot. The officers suspected that it contained accomplices. *United States v. Valenzuela,* 546 F.2d 273 (9th Cir. 1976). There was the real possibility that the Buick might be taken away with or without guards having been posted. The vehicle was therefore taken to the Foster City Police Department for impoundment and safekeeping. On the following day the officers obtained a search warrant for the footlocker, opened it and found three pounds of cocaine which formed the basis for the possession charge.

This case is not controlled by *United States v. Chadwick,* 45 U.S.L.W. 4797 (June 21, 1977). There a locked footlocker was found in possession of two train

passengers under circumstances leading train personnel and investigating federal narcotics agents to believe the luggage contained contraband. This belief was bolstered by the positive reaction of a dog trained to detect marijuana. The passengers to whom the footlocker was shipped were arrested and taken, with the footlocker, to the Federal Building where a search of the footlocker was conducted and marijuana was found. No warrant for the search had been sought or obtained, nor was there any risk of loss of the footlocker or its contents in taking the time necessary to obtain a search warrant. The Court held that the *Chambers v. Maroney* line of cases did not apply.

> "The factors which diminish the privacy aspects of an automobile do not apply to respondents' footlocker. Luggage contents are not open to public view, except as a condition to a border entry or common carrier travel; nor is luggage subject to regular inspections and official scrutiny on a continuing basis. Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile.
>
> "Nor does the footlocker's mobility justify dispensing with the added protections of the Warrant Clause. Once the federal agents had seized it at the railroad station and had safely transferred it to the Boston federal building under their exclusive control, there was not the slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained. The initial seizure and detention of the footlocker, the validity of which respondents do not contest, were sufficient to guard against any risk that evidence might be lost. With the footlocker safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant." *United States v. Chadwick,* 45 U.S.L.W. at 4800 (June 21, 1977). (Footnote omitted).

In the case now before the court, a search warrant was obtained for the footlocker and it was opened pursuant thereto. In it was a quantity of cocaine. The appellants are thus driven back to their final contention, which is that the warrant was defective because the affidavit which supported its issuance was insufficient.

The standards for reviewing the sufficiency of a search warrant affidavit in this case are stated in *United States v. Lucarz,* 430 F.2d 1051, 1055 (1970), as follows:

> We come then to determine whether the allegations of the first nine paragraphs of the affidavit gave the magistrate probable cause to believe the stolen registry envelopes were at defendant's residence. We do so mindful that affidavits are to be interpreted in a common sense and realistic manner, United States v. Ventresca, 380 U.S. 102, 108-109, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965), and that probable cause exists when the facts and circumstances shown in the affidavit would warrant a man of reasonable caution in the belief that the items to be seized were in the stated place, Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949).

The affidavit here states among other things that Agent Henley paid O'Donnell $1,700 in pre-recorded DEA money for one ounce of cocaine and that a booking search of Baker and Bryan revealed that they were in possession of some of that money.[2]

We have examined the affidavit with some care and are convinced that the search warrant was issued pursuant to lawful authority. All of the contested issues were resolved in favor of the government by the district judge and we agree with those dispositions.

The judgment is AFFIRMED.

[2]Since the money found in the briefcase in the trunk of the Buick was not introduced in evidence, we need express no opinion on the validity of the action of the officers in opening it. Moreover, this aspect was not assigned as error by either appellant.

Appendix B

United States Court of Appeals
for the Ninth Circuit

United States of America, Plaintiff-Appellee, vs. Bruce John Baker, Defendant-Appellant.	No. 77-1134
United States of America, Plaintiff-Appellee, vs. John Stephen Bryan, Defendant-Appellant.	No. 77-1509

[Filed Mar. 6, 1978]

ORDER

Before: BARNES and TRASK, Circuit Judges, and BURNS,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Trask has voted to reject the suggestion for a rehearing en banc. Judges Barnes and Burns recommend against a rehearing en banc.

*Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Appendix C

In the United States District Court
for the Northern District of California

No. CR-76-512 RFP

United States of America,
Plaintiff,

vs.

1. Jeffrey Leroy Wardley,
2. Ronald William O'Donnell,
3. Deborah Margaret Sears,
4. Bruce John Baker,
5. John Stephen Bryan,

Defendants.

[Filed Dec. 20, 1976]

MEMORANDUM AND ORDER

Facts

On August 17, 1976, Agent Henley of the federal Drug Enforcement Administration and Detective Bergman of the Foster City Police Department met in an undercover capacity with the alleged co-conspirators Wardley and O'Donnell at the Winery Restaurant in Foster City. After selling Agent Henley 27.31 grams of cocaine from a blue canvas flight bag in his car, O'Donnell informed the officers that four

additional pounds of cocaine were available for sale and that they were in the possession of "Debbie" in Palo Alto. Following a telephone call to "Debbie," O'Donnell drove to Palo Alto to obtain a one ounce sample, returning two hours later at approximately 4:20 p.m. After negotiations and several phone calls to Palo Alto, it was agreed that three people would transport the cocaine from Palo Alto to O'Donnell in Foster City: "Debbie," the resident of the house in Palo Alto where the cocaine was located, and the source of supply for the cocaine. O'Donnell was to deliver the cocaine to the officers one-half pound at a time.

At 7:10 p.m., O'Donnell left the restaurant to meet with "Debbie." Shortly thereafter, Agent Wilson of the Drug Enforcement Administration, who was on surveillance outside the Winery Restaurant, observed O'Donnell and two individuals, later identified as defendants Sears and Baker, appear from behind the Winery, walk across the parking lot and enter O'Donnell's 1969 Chevrolet. About five minutes later, Wilson saw defendant Baker emerge from the Chevrolet, walk across the parking lot in the same direction from which he had come a few minutes earlier and disappear behind the Winery. Baker reappeared a few minutes later carrying a small blue canvas flight bag which he placed in the trunk of the Chevrolet before getting into the car with Sears and O'Donnell.

At approximately 7:45 p.m., Agent Wilson saw a tan 1969 Buick driven by an individual subsequently identified as defendant Bryan appear from the direc-

tion from which Baker had come with the blue flight bag. Bryan parked the Buick facing O'Donnell's Chevrolet. Baker got out of the Chevrolet and entered the Buick, which drove around the parking lot changing its location twice before parking next to the Chevrolet. Sears then exited the Chevrolet and joined Baker and Bryan in the Buick, which again changed its position parking a couple of rows from the Chevrolet.

O'Donnell rejoined Agent Henley in the Winery, informed him that the cocaine had arrived, and led him to the trunk of the Chevrolet which contained a blue flight bag. Upon opening the bag, O'Donnell showed Agent Henley that it contained a half pound of cocaine. Agent Henley arrested O'Donnell inside the Chevrolet where payment was to be made and removed the flight bag containing the cocaine from the trunk of the Chevrolet.

State and federal law enforcement officers arrested defendants Sears, Baker and Bryan in Bryan's Buick shortly thereafter. Wardley was arrested in the Winery Restaurant. Agent Krehbiel removed the car keys from the ignition of the Buick and handed them to Detective Bergman, who opened the trunk. Bergman observed inside the trunk a briefcase and locked metal footlocker. He opened the briefcase, finding a large amount of money, but decided to obtain a search warrant before prying open the footlocker.

At the Foster City Police Station, the defendants were subjected to a booking search, which revealed that all the defendants except Wardley were in pos-

session of pre-recorded DEA money used earlier that day to purchase one ounce of cocaine from O'Donnell. Armed with a search warrant the next day, officers opened the footlocker and found 1,307.8 grams of cocaine.

DISCUSSION

Defendant Bryan, with whom the other defendants join where applicable, has submitted two separate motions arguing for the suppression of evidence found pursuant to the arrests. The first motion, entitled Motion to Suppress Evidence, contains three main arguments: defendant first argues that law enforcement officers lacked probable cause to arrest him; he then argues in the alternative that, even if the arrest itself was valid, the search of the trunk of his automobile exceeded the permissible scope of searches incident to an arrest; finally he contends that one of the officers violated his *Miranda* rights in asking him for the keys to his trunk without informing him of his right to refuse the request. In the second motion, entitled Motion to Suppress Evidence for Invalidity of Search Warrant, defendant argues that the allegations contained in the affidavit for the search warrant are insufficient to establish probable cause to issue the warrant. We conclude that none of the arguments have merit.

In the absence of an applicable federal statute, the law of the state where a warrantless arrest occurs determines the arrest's validity. *United States v. Di Re,* 332 U.S. 581 (1948). The Ninth Circuit, in determining the sufficiency of evidence to engage in a search

or seizure, has consistently applied California law in those cases involving state law enforcement officers, insofar as the state law does not violate the United States Constitution. *United States v. Hall,* ..... F.2d ..... (9th Cir. 1976, No. 75-2666), *Wartson v. United States,* 400 F.2d 25 (9th Cir. 1968). The question of whether to apply state or federal law becomes more complex where, as in this case, both state and federal law enforcement agents were involved. In *United States v. Scott,* 520 F.2d 697 (9th Cir. 1975), *cert. denied,* 96 S.Ct. 788 (1966), the court appears to have applied state law to state police officers and federal law to F.B.I. agents jointly participating in a search and arrest. Since we perceive no conflict between state and federal law with respect to the issues confronting this court, we shall apply the law of both jurisdictions.

The Validity of the Arrest

Relying on *United States v. Di Re, supra,* defendant Bryan contends that his presence in an automobile parked in a public parking lot is wholly consistent with innocent activity and therefore did not provide the necessary basis for making an arrest. In *Di Re,* the police had information from a reliable informant, Reed, that one Buttitta was going to sell him counterfeit gasoline ration coupons. They had no such information with respect to Di Re. When the police arrived at the location where the sale was to occur, they found Reed, Buttitta, and Di Re in the car. They arrested all three, and in searching Di Re they dis-

covered counterfeit gasoline ration coupons in his pocket. The Supreme Court found that there was no probable cause for arresting Di Re, and that in the absence of other information tending to establish his culpability, his mere presence in the car with Buttitta and Reed did not warrant the inference that he was engaged in criminal activity. The Court stated:

> The argument that one who "accompanies a criminal to crime rendezvous" cannot be assumed to be a bystander . . . is farfetched when the meeting is not secretive or in a suspicious hide-out but in broad daylight, in plain sight of passerby, in a public street of a large city, and where the alleged substantive crime is one which does not necessarily involve any act visibly criminal . . . Presumptions of guilt are not lightly to be indulged from mere meetings.

332 U.S. at 593.

If Bryan's arrest had been based solely on the presence in his vehicle of Sears and Baker, then the arrest would indeed have been invalid. But here, unlike the situation in *Di Re*, the officers had other information about Bryan. Earlier in the day, O'Donnell, who appears to have played a pivotal position in setting up the narcotics transaction, had told the officers that three people would bring the cocaine from Palo Alto to Foster City: "Debbie," the resident of the house in Palo Alto where the cocaine was located, and the source for the cocaine. Shortly after O'Donnell left the restaurant to meet with his confederates from Palo Alto, Special Agent Wilson saw O'Donnell walking across the parking lot with Sears

and Baker. While O'Donnell had not described Bryan or stated what kind of vehicle he would be driving, it was certainly reasonable for the officers to conclude, once Baker and Sears got into Bryan's car and drove around the parking lot with him, that Bryan was indeed the third man.

We find that these facts are analogous to those in *United States v. Valenzuela*, ... F.2d ..... (9th Cir. 1976, No. 75-2938). In that case, a reliable informant told the police that one Rios was trafficking in marajuana. Three months later, after receiving similar information from another informant, the police put Rios' house under surveillance. They saw a number of people, including the defendant, arrive at the house and then depart. The police stopped and searched the defendant's car after he was seen loading boxes into his trunk in front of Rios' house. The court upheld the search, noting that, "the activity, while it looked innocent, took on a wholly different character when reinforced by the informant's information."

"Probable cause exists if the facts and circumstances known to the officers warrant a prudent man in believing that an offense has been committed . . . Probable cause has also been defined as having more evidence for than against, supported by evidence which inclines the mind to believe, but leaves some room for doubt." *People v. Ingle*, 53 C.2d 407, 412, 413 (1960). Given their observations of Bryan's interactions with the two other defendants, plus the knowledge that three persons would be bringing

cocaine to Foster City in a vehicle, we conclude that probable cause existed to arrest Bryan.

It is more apparent that the officers had probable cause to arrest Sears and Baker. Agent Wilson saw Baker place in O'Donnell's trunk a blue canvas bag identical to the one which Agent Henley discovered to contain a large amount of cocaine. The officers could reasonably conclude from Sears' interactions with Baker and O'Donnell that she was the "Debbie" to whom O'Donnell had referred several times. The officers knew that one of the three people transporting the cocaine from Palo Alto was a woman. Sears was the only woman seen with the defendants.

The Search of the Trunk

An automobile may be search (sic) without a warrant if there is probable cause to believe that it contains contraband and if there are exigent circumstances that make it impossible or impractical to secure a warrant. *Chambers v. Maroney*, 399 U.S. 42 (1970), *People v. Cook*, 13 C.3d 663 (1975). The officers in this case possessed the requisite probable cause. They knew that three suspects had agreed to bring four pounds of cocaine from Palo Alto, which O'Donnell was to deliver to Agent Henley one-half pound at a time. Agent Henley arrested O'Donnell after the delivery of the first one-half pound. Since O'Donnell's vehicle contained only a fraction of the amount to be delivered, it was reasonable for the officers to conclude that the rest of the cocaine was contained in the automobile occupied by the three suspects from Palo Alto.

Defendants' reliance on *Howard v. United States*, 423 F.2d 1102 (9th Cir. 1970) is misplaced. In that case, the defendant parked his car across the street from another vehicle known to contain marajuana, and switched cars. In overturning the search of the first vehicle, the court characterized that vehicle as, "merely the means of locomotion by which the person suspected of participating in illegal drug traffic reached the site of that activity." 423 F.2d at 1103. In the present case, by contrast, Bryan's vehicle was not merely "the means of locomotion." Here the vehicle subject to search was reasonably believed to be the means of transporting the contraband itself.

Moreover, we conclude that exigent circumstances existed making it impracticable to secure a search warrant. The vehicle was located in a public parking lot at approximately 8:15 in the evening, and there could have been accomplices in the area who could have driven the vehicle and the incriminating evidence from the area.

At the suppression hearing, law enforcement officers testified that they observed a green van circling the parking lot in a suspicious manner, leading them to believe that confederates were in the vicinity. Without passing on the credibility of this testimony, we conclude from our analysis of recent Ninth Circuit cases that it is not necessary to point to specific facts suggesting the presence of accomplices in the area. In *United States v. Valenzuela*, ... F.2d ..... (9th Cir. 1976, No. 75-2938), the court based its conclusion that exigent circumstances existed on its observation that, ". . . there *could have been* accom-

plices in the area. Delay would very likely have resulted in a loss of evidence." (Emphasis added.) Likewise, in *United States v. McClain*, 531 F.2d 431 (9th Cir. 1976), the court upheld a warrantless search, noting:

> Here, as in *Chambers*, the car was in a public place late at night, accessible to anyone who might want to reach it. Here, as in *Chambers*, McClain could have had accomplices in the vicinity who might drive the car away while the agents were getting a warrant. [Emphasis added.]

531 F.2d 431 at 433.

The same standards for engaging in a warrantless search of an automobile prevail in the California courts. For example, in *People v. Laursen*, 8 C.3d 192 (1972) the court, having concluded that the mere immobilization of an automobile is as substantial an intrusion on the constitutional rights of the owner or possessor as an immediate search or impoundment, stated:

> Although defendant had apparently abandoned the automobile in effecting his escape, he or others acting in his behalf could have returned to retrieve it or to remove evidence.

The court therefore upheld the officer's decision to impound the vehicle.

The Miranda Argument

Defendant Bryan next argues that in asking him for the keys to his trunk, without informing him of his right to refuse, the officer violated his *Miranda*

rights. This argument is totally without merit. The United States and the California Supreme Courts have both ruled that no *Miranda*-type presearch admonitions are required before obtaining consent to search. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), *People v. Duren*, 9 C.3d 218 (1973); see also *United States v. O'Looney* (9th Cir. Slip Op. No. 75-2666, August 31, 1976, p. 4). But more importantly, uncontroverted testimony revealed that Agent Krehbiel, rather than asking Bryan for the keys to the trunk, took them from the ignition. Therefore, the issue here is not one of consent, but whether Agent Krehbiel committed an impermissible seizure in removing the keys from the ignition. Having ruled that sufficient probable cause and exigent circumstances existed to search the trunk, we can only conclude that the seizure of a trunk key in plain sight did not constitute a greater intrusion on the defendant's rights.

The Sufficiency of the Search Warrant Affidavit

Defendant Bryan, with whom Sears and Baker join, argues that the allegations contained in the affidavit of Detective Bergman are insufficient to establish probable cause to issue a warrant to search the automobile. The California Supreme Court has described the standards for reviewing the sufficiency of a search warrant affidavit as follows:

> The affidavit sets forth facts such as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain, a strong suspicion that there was evidence of criminal

> conduct . . . Where . . . there is a substantial basis for the magistrate to have concluded that evidence of criminal conduct was present in the vehicle, his determination will be sustained.

People v. McDaniel, 16 C.3d 156, 174 (1976). The affidavit states that Agent Henley paid O'Donnell $1,770 in prerecorded DEA money for one ounce of cocaine; that a booking search of Baker, Bryan and O'Donnell revealed that Baker was in possession of $100, Bryan of $1,400 and O'Donnell of $200 of the prerecorded DEA money. We feel that this evidence, in addition to a description of the defendants' activities at the Winery Restaurant, was sufficient to justify the issuance of a search warrant.

Accordingly, defendants' motions to suppress evidence are denied.

It Is So Ordered.

Dated: December 18, 1976

/s/ Robert F. Peckham
United States District Judge

Appendix D

In the Municipal Court of the Central Judicial District of the County of San Mateo, State of California

SEARCH WARRANT

The People of the State of California to Any Peace Officer in the County of San Mateo, State of California:

Proof by affidavit having been this day made before me by Barry Bergman, Detective, Foster City Police Department and it appearing therefrom that there is probable cause to believe that certain articles and property, consisting of:

Cocaine, cutting agents, paraphernalia involved in the preparation and use of cocaine, razor blades, straws, scales, spoons and indicia of ownership of the vehicles.

in the vehicle[s] described as a 1969 Chevrolet California Lic #523AFN blk/grn and a 1969 Buick Calif. Lic. #ZQV576 tan in color, both of which are currently impounded and stored at Foster City Police Dept., 1040 E. Hillsdale Blvd., Foster City.

in said county and state [described as

San Mateo County, City of Foster City

And it further appearing that said articles and property constitute grounds for the issuance of a search warrant pursuant to Penal Code Section 1524.

You Are Therefore Commanded in the daytime and nighttime [ ] to search the person[s], vehicle[s],

and premises described above for said articles and property, and if you find the same or any part thereof to take the same in your custody pending disposition according to law. Return of this Search Warrant shall be to the above entitled court.

Given Under My Hand and dated this August 18, 1976.

/s/ Thomas B. Caldwell
Judge of the Municipal Court
of the Judicial District, County
of San Mateo, of California

[Seal]

Page No. 1

FOSTER CITY POLICE DEPARTMENT
SEARCH I.D. LIST

DATE 8-18 1976 TIME 0100 LOCATION FOSTER CITY PD

CASE NO. 20434 SUSPECTS JEFF WARDLEY, RONALD O'DONNELL-
BRUCE BAKER, JOHN BROWN, DEBORAHA SEAR

ITEM NO.	DESCRIPTION OF ITEMS	LOCATION WHERE ITEMS FOUND	BY WHOM
1	6½ POUND BAGS	SAFEWAY BAG INSIDE A RED	Smith
	OF COCAINE & 1	WT & BLUE METAL LOCKER	
	¼ OZ BAG OF COCAINE	IN TRUNK OF BUICK	
	(APPX ESTIMATE ON	ZQV 576	
	WEIGHT)		
2	$10,800 IN CASH	GREY "AMERICAN TOURISTER"	
		BRIEFCASE - IN TRUNK	Smith
		OF BUICK ZQV 576	
3	21 MARIJUANA	BLACK SHAVING KIT	Smith
	CIGARETTES	IN BRIEFCASE IN TRUNK	
		OF BUICK ZQV 576	
4	VARIOUS PERSONAL	GREY "AMERICAN TOURISTER"	Smith
	TOILETRIES	BRIEFCASE - IN TRUNK	
		OF BUICK ZQV 576	
5	1 PLASTIC BAG	RT FRONT FLOORBOARD	Smith
	CONTAINING	OF BUICK ZQV 576	
	MARIJUANA		
16	TRIPLE BEAM BALANCE	- TRUNK OF BUICK	
	SCALE "MODEL 700"	ZQV 576	

CPD 0118

172

In the Municipal Court of the Central Judicial District
of the County of San Mateo, State of California

AFFIDAVIT FOR SEARCH WARRANT

The Undersigned, being first duly sworn, deposes and says: That on or about August 17, 1976, in the County of San Mateo, State of California, the crime[s] of 11350 H&S

Sale of cocaine

was committed by Ronald O'Donnell

That there is probable cause to believe that certain articles and property, consisting of: cocaine, cutting agents, paraphernalia involve in the preparation and use of cocaine, razor blades, straws, spoons, scales, and indicia of ownership of the vehicles

in the vehicle[s] described as a 1969 Chevrolet Calif. Lic #523AFN (blk/grn) and a 1969 Buick Calif. Lic #ZQV576 (tan in color) both of which are currently impounded and stored at Foster City Police Department, 1040 E. Hillsdale Blvd., Foster City, Ca.

in said county and state [described as

San Mateo County, City of Foster City

That the following facts establish the existence of grounds for issuance of a Search Warrant for the search of the vehicles described above:

Your affiant is Barry Bergman; I am employed as a detective with the Foster City Police Department. I have been employed there for approximately 3 years; I am currently assigned to narcotics and vice. For

the past two years my primary assignment has been narcotics investigation. I have been involved in excess of 100 narcotics investigations during the past time; I have attended several courses and seminars in police narcotics investigation and identification, including the Department of Justice Narcotic Officer Training Course.

On August 17, 1976 at around 12 noon Alvah Henley and myself were in the Winery, located 1998 Beach Park Blvd., Foster City. At that time Agent Henley, who is a Special Agent for the U.S. Drug Enforcement Administration and I met Jeffrey Wardley and Ronald O'Donnell. At that time we discussed the purchase of one ounce of cocaine for $1770. Agent Henley and O'Donnell left the Winery, and I am informed by Agent Henley that he and O'Donnell went to a vehicle used by O'Donnell. I have been informed by Law Enforcement officials in Santa Cruz County that O'Donnell has been seen driving this 1969 Chevrolet Cal. Lic #523 AFN, and additionally that this vehicle has been seen parked in front of O'Donnell's residence at 134 Wanda Court, Santa Cruz. Agent Henly has informed me that he and O'Donnell went to O'Donnell's vehicle and both of them entered the vehicle, where O'Donnell produced one ounce of white powder which I later tested and which proved positive for cocaine. Agent Henley purchased that ounce for $1770 prerecorded funds.

Following that transaction Agent Henley and O'Donnell returned to the Winery where they conversed with myself and Wardley. During the conversation,

O'Donnell related that, after he received a page for a telephone call, that Debbie's "people" had four pounds of cocaine at the house she was at in Palo Alto. O'Donnell further related that this Debbie's people wanted to sell all of the cocaine this evening. O'Donnell related to me further that he had seen the pounds of cocaine at this house. In order to set up the sale of this quantity of cocaine to this officer Debbie and her people were going to bring up the pounds from Palo Alto. O'Donnell was then to meet with Debbie and her people and transport the cocaine for sale 8 oz. at a time. After the initial purchase of 8 oz., he was to go back to Debbie, obtain the next 8 oz. make the sale, return to Debbie, etc. until all of the pounds were sold to this officer. O'Donnell related that all of the pounds were to be up in the Foster City area and that it would only take at most 15 min between transactions.

Later today, after the phone conversation, O'Donnell left the Winery and returned about one hour later. At that time, O'Donnell and Agent Henley went out to O'Donnell's car. Agent Henley informed me that O'Donnell produced from a blue bag in the front seat area of his same 1969 Chevy 523 AFN a plastic container of white powder, which I later tested positive for Cocaine. Agent Henley told me that he was showed the cocaine, and then I arrived at the car, seeing Agent Henley and O'Donnell as well as the cocaine. Following the discussion with O'Donnell, he placed the white power into the glove compartment of his vehicle and all parties went back into the Winery.

During the early evening, August 17, 1976, O'Donnell made a phone call to his contacts in Palo Alto according to what O'Donnell told me. A while later, O'Donnell left the Winery to go into the parking lot of the Winery.

David Wilson, Special Agent for the Drug Enforcement Administration, was maintaining surveillance in the parking lot area. He related to me that he observed persons later identified as O'Donnell, Bruce Baker, and Debbie Sears walking across the parking lot. They got into O'Donnell's vehicle; Baker later got out and walked across the parking lot and out of view. A few moments later, Baker returned from across the parking lot to O'Donnell's vehicle, carrying a blue bag. O'Donnell got out of the car and both men went to the trunk of O'Donnell's vehicle and placed the bag in the trunk of O'Donnell's car. A short time later a person later identified as John Stephen Bryan drove across the parking lot in a 1969 tan Buick #ZQV 576 from the direction that O'Donnell had walked to and from in the preceeding (sic) minutes. Bryan drove the Buick and parked next to O'Donnell's vehicle facing nose to nose. The preceeding (sic) information was related to me by Agent Wilson.

At this time, I came out of the Winery with Wardley and observed the two cars parked in the parking lot as previously described, with the trunk of the Buick now open. I observed someone at the trunk of this vehicle and then went back into the Winery.

At this time Agent Wilson observed Baker and Bryan get into the Buick backed up the vehicle about

40′ and sat there for a few minutes; the vehicle then pulled up parallel to the Chevy; Debbie Sears then got out of O'Donnell's car and into the Buick. The Buick then was driven a short distance away where it remained.

O'Donnell then went into the Winery; a short time later he exited the Winery. Agent Henley related to me that he and O'Donnell left the Winery and went to O'Donnell's car, where O'Donnell went to the trunk of his vehicle and he showed Agent Henley the white powder which I later tested positive for cocaine. After seeing the powder Agent Henley and O'Donnell went into the vehicle where O'Donnell was arrested.

I have personally run the registrations on the two vehicles involved and have found that the 1969 Buick ZQV 576 is registered to John Stephen Bryan.

After the arrest of Baker, Bryan and O'Donnell, a booking search of the suspects was conducted which revealed that Baker had on his person $100 of pre-recorded DEA money; Bryan had $1400 of pre-recorded DEA money and O'Donnell had $200 of pre-recorded DEA money. This was the same money that had earlier been used by Agent Henley to make the first purchase of $1770 for the ounce of cocaine. This information was related to me by Agent Henley who made the purchase with the pre-recorded money and Agent James Krehbiel, of the DEA who found the money on each of the suspects.

Since the time that Agent Henley had seen the ounce of cocaine in O'Donnell's Chevy, that vehicle has been

under constant police surveillance and no one has been seen to remove it.

Wherefore, Affiant Prays that a Search Warrant issue commanding that search be made of the person[s], vehicle[s], and premises described above ~~for~~ said articles and property, and that nighttime execution of the Search Warrant be authorized for the following reasons:

The arrest took place at 8:30 p.m. and the vehicles impounded at 9:30 p.m. The impound area is not a high security area and for the preservation of the evidence it is requested that nighttime service be allowed. The cars are parked in the rear of the police station in an area which is neither fenced nor constantly guarded.

/s/ Barry Bergman
Barry Bergman #21
Detective of Police

Subscribed and sworn to before me this August 18, 1976.

/s/ Thomas B. Caldwell
Judge of the Municipal Court of the Judicial District, County of San Mateo, State of California

[Seal]